

from regulation by the Congress in respect of matters such as these, there can be no "code" for it at all. This is clear from the provisions of § 7a of the Act with its explicit disclosure of the statutory scheme. Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder. A code collapses utterly with bone and sinew gone.

I am authorized to state that MR. JUSTICE STONE joins in this opinion.

LOUISVILLE JOINT STOCK LAND BANK v.  
RADFORD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
SIXTH CIRCUIT.

No. 717. Argued April 1, 2, 1935.—Decided May 27, 1935.

1. The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. P. 589.
2. Under the bankruptcy power, Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts; but it can not take for the benefit of the debtor rights in specific property acquired by the creditor prior to the Act. P. 589.
3. The Fifth Amendment commands that, however great the Nation's need, private property shall not be taken even for a wholly public use without just compensation. P. 602.
4. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public. Pp. 598, 602.
5. The provisions added to § 75 of the Bankruptcy Act by the Act of June 28, 1934, known as the Frazier-Lemke Act, operate, as applied in this case, to take valuable rights in specific property from one person and give them to another, in violation of the Constitution. P. 601.

6. The controlling purpose of this Act is to preserve to the mortgagor the ownership and enjoyment of his farm property. Its avowed object is to take from the mortgagee rights in the specific property held as security; and to that end to scale down the indebtedness to the present value of the property. P. 594.
7. Examination of the measures of relief extended to necessitous mortgagors by courts of equity and by statute, prior to the Frazier-Lemke Act, reveals no instance in which the mortgagee was compelled to relinquish the property to the mortgagor free of the lien unless the debt was paid in full. P. 579.
8. The right of the mortgagee to insist upon full payment before giving up his security has been deemed the essence of the mortgage. To protect this right he is allowed to bid at the judicial sale on foreclosure. Practically all the measures adopted in the States for the mortgagor's relief, including moratorium legislation in the present depression, resulted primarily in a stay, and the relief rested upon the assumption that no substantive right of the mortgagee was being impaired, since payment of the debt with interest would fully compensate him. Cf. *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398. P. 580.
9. Although each of our national bankruptcy Acts followed a major or minor depression, none had, prior to the Frazier-Lemke Act, sought to compel a mortgagee to surrender to the bankrupt either the possession of the mortgaged property or the title, so long as any part of the debt remained unpaid, or to supply the bankrupt with capital with which to engage in business in the future, or to disturb even a mortgage of exempt property. P. 581.
10. No other bankruptcy Act has undertaken to modify in the interest of the debtor or of other creditors any substantive right of the holder of any mortgage valid under the federal law. P. 583.
11. In the exercise of the power to marshal liens, sell the property free, and transfer the lienors' rights to the proceeds of sale, there has been no suggestion that the sale could be made to the prejudice of the lienor, in the interest of the debtor or other creditors. P. 584.
12. A sale free from liens in no way impairs any substantive right of the mortgagor, and such a sale is not analogous to the sale to the bankrupt provided for by Paragraph 7 of the Frazier-Lemke Act. P. 585.
13. The provisions of prior bankruptcy Acts concerning compositions afford no analogy to Paragraph 7 of the Frazier-Lemke Act.

Never, so far as appears, has a composition affected a secured claim held by a single creditor. P. 585.

14. Although the original purpose of the bankruptcy Acts was the equal distribution of the debtor's property among his creditors, the power is not so limited; and its exercise has broadened, so that the discharge of the debtor has come to be an object of no less concern than the distribution of his property. P. 587.
15. The Court has no occasion in this case to decide whether the bankruptcy clause confers upon Congress, generally, the power to abridge a mortgagee's rights in specific property, since the Frazier-Lemke Act deals only with mortgages preëxisting. P. 589.
16. A bank, which ten years previously had made a long time loan of \$10,000, interest at 6%, secured by mortgages on a Kentucky farm then worth presumably twice that sum, was obliged by defaults to foreclose in a state court. The mortgagor refused the bank's offer to take the farm in satisfaction of the debt, and, before a judicial sale was ordered, he took advantage of the Frazier-Lemke Act, meanwhile enacted, and was adjudged a bankrupt. The bank offered to pay into the bankruptcy court for the property over \$9,000, which, if accepted, would have been returned to the bank in satisfaction of the debt; but this was refused. The property was appraised at \$4,445. Upon the bank's refusing its assent to a "sale" of the property at that price, by the trustee to the bankrupt, upon the terms specified in Paragraph 3 of the Act, the court, proceeding under Paragraph 7, ordered that for a period of five years all proceedings to enforce the mortgages be stayed; and that the possession of the property remain in the bankrupt, "under control of the court," subject only to the payment of an annual rental to be fixed by the court. The rental for the first year was fixed at \$325, but no other provision was made for taxes, insurance, and administrative charges. *Held*:

(1) That the Act as applied had taken from the bank the following property rights recognized under the law of Kentucky governing mortgages, viz.: (a) The right to retain the lien until the indebtedness thereby secured was paid. (b) The right to realize upon the security by a judicial public sale. (c) The right to determine when such sale shall be held, subject only to the discretion of the court. (d) The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair

competitive sale or by taking the property itself. (e) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt. Pp. 590, 594.

(2) No substitute for these rights is to be found in Paragraph 3 of the Act, which provides that at the request of the bankrupt, with the assent of the mortgagee, the trustee may make a "sale" of the property to the bankrupt at its so-called appraised value, in consideration of the bankrupt's implied agreement to pay 2½% within two years, 2½% within three years, 5% within five years, and the balance within six years, with interest on deferred payments at only 1% per annum. P. 591.

(3) No substitute for the rights taken is to be found in Paragraph 7. That section gives the bankrupt, without the mortgagee's consent, full possession for five years, with no monetary obligation beyond paying a reasonable rental fixed by the court. No other provision is made for insurance or taxes; and during the extension the bankrupt has the option of buying the property free, at any time, at its appraised or reappraised value; but he need not buy at all. The mortgagee is not only compelled to submit to the sale to the bankrupt, but to a sale made at such time as the latter may choose. He can not require a reappraisal when, in his judgment, the time comes to sell; he may ask for a reappraisal only if and when the bankrupt requests a sale. P. 592.

(4) While Paragraph 7 declares that the bankrupt's possession is "under the control of the court," this clause gives merely a supervisory power, which leaves the court powerless to terminate the bankrupt's option, unless there has been the commission of waste or failure to pay the prescribed rent. P. 593.

74 F. (2d) 576, reversed.

CERTIORARI, 294 U. S. 702, to review a judgment affirming orders of the District Court in proceedings taken by Radford under the amendment of June 28, 1934, to § 75 of the Bankruptcy Act.

*Messrs. John W. Davis and Wm. Marshall Bullitt, with whom Mr. John E. Tarrant was on the brief, for petitioner.*

The Frazier-Lemke Act is not a law "on the subject of bankruptcies"; does not deal with any subject over

which power is delegated to Congress; and is, therefore, in contravention of the Tenth Amendment.

Until this Act, the essential features of bankruptcy law were: First, on the part of the debtor—a surrender of his property and its ratable distribution among his creditors; and, second, on the part of the creditors—discharge of all claims against the debtor after distribution.

If it be that concentrated in the Federal Government is the power to control every situation involving non-paying debtors, then the commercial life of each State is subject, in large measure, to federal regulation; for example, Congress could divest state courts of jurisdiction over suits upon promissory notes between citizens of the same State; commercial controversies arising from breach of contract would fall under a like control; crimes such as the obtaining of goods or credits by false pretenses could be defined as crimes against the United States without regard for the powers reserved under the Tenth Amendment to the several States, and, indeed, the lines between state and federal governments could be largely redrawn. This all-embracing doctrine is without constitutional basis and should not, by this Court's sanction, now be written into the Constitution. *United States v. Fox*, 95 U. S. 670.

To effect distribution is the principal object of all bankruptcy laws, see *Straton v. New*, 283 U. S. 318, 320; *Bailey v. Glover*, 21 Wall. 342, 346; *Mayer v. Hellman*, 91 U. S. 496, 501; *Wiswall v. Campbell*, 93 U. S. 347, 350; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307; *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 554; *Hanover National Bank v. Moyses*, 186 U. S. 181, 186; *In re California Pacific R. Co.*, Fed. Cas. No. 2,315.

For strong emphasis upon the necessity for distribution, see also *In re Reiman*, Fed. Cas. No. 11,673 at p. 495; *Leidigh Carriage Co. v. Stengel*, 95 Fed. 637, 647; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 556; *In re*

*Jordan*, Fed. Cas. No. 7,514; *In re Vogler*, Fed. Cas. No. 16,986; 2 Story on the Constitution (5th ed.), § 1106; Levinthal, *The Early History of Bankruptcy Law*, 66 U. of Pa. L. Rev. at p. 225.

It was never the purpose of the Frazier-Lemke Act to distribute the farmer's assets, but only to scale down his debts, while permitting him to retain his assets. Sen. Rep. on S. 3580, May 28, 1934; H. Rep. on H. R. 9566, May 31, 1934; 78 Cong. Rec., p. 12,297, June 16, 1934.

The Frazier-Lemke Act is bottomed on principles entirely alien to established bankruptcy law. It is specifically directed against mortgagees and other secured creditors, and was enacted for the very purpose of depriving them of the collateral for which they had bargained and of giving it to the farmer-debtor. This is clearly shown by the legislative history of the Act. *In re Bradford*, 7 F. Supp. 665, 675.

The Circuit Court of Appeals erroneously relied upon supposed analogies to (1) the transfer of a creditor's lien to the proceeds of sale, and (2) "compositions" binding non-assenting creditors.

The Frazier-Lemke Act deprived the Land Bank of its property without due process of law by denying the Bank its fundamental right to have the mortgaged property applied to the payment of its debt. The power of Congress to legislate on the "subject of bankruptcies" is subject to the limitations of the Fifth Amendment. *Hanover National Bank v. Moyses*, 186 U. S. 181, 192.

The fundamental law vests in a mortgagee the right to have the mortgaged property devoted exclusively to the satisfaction of the mortgage debt.

Congress under the power to pass laws on the subject of bankruptcies, can impair the obligation of contracts—for such is the very essence of bankruptcy law—yet it can not destroy vested rights of property, contrary to the law of the land. *Gunn v. Barry*, 15 Wall. 610; *In re Dillard*.

Fed. Cas. No. 3,912; *Loan Association v. Topeka*, 20 Wall. 655, 662, 664; *Ochoa v. Hernandez*, 230 U. S. 139, 161.

The Frazier-Lemke Act contains provisions so unreasonable, capricious and arbitrary that the Land Bank is deprived of its property without due process of law.

It discriminates between creditors before and after June 28, 1934, and between creditors secured by exempt property and those secured by non-exempt property. It makes no provision for a deficiency claim by the mortgagee against the bankrupt's estate. Interest on the mortgage debt is wiped out save for a negligible amount.

The fixing of the value of the debtor's property by appraisal at its "then fair and reasonable value, not necessarily the market value," is arbitrary, capricious and unreasonable. All risk of a decline in value is placed on the creditor.

The arbitrary operation of this Act is illustrated by the possibility in many cases of a mortgagee or secured creditor being worse off than the unsecured creditor.

It also discriminates in the method of procedure as to the relative rights of secured and unsecured creditors in electing between (s) (3) and (s) (7); as to the reappraisal provisions; in the absence of any provision for a reappraisal of personal property pledged or unpledged; in its rigid fixation of terms by legislative fiat; in the terms of purchase; and in the terms of possession in interim.

The discrimination between debts contracted prior to June 28, 1934, and debts contracted thereafter is a violation of the due process clause of the Fifth Amendment. *Heiner v. Donnan*, 285 U. S. 312. See also *Schlesinger v. Wisconsin*, 270 U. S. 230; *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32; *Bronson v. Kinzie*, 1 How. 311.

The Act is a legislative invasion of the judicial power contrary to Art. III, § 2, of the Constitution. *Ogden v. Saunders*, 12 Wheat. 213, 365; *Kilbourn v. Thompson*,

103 U. S. 168, 192; *Burt v. Williams*, 24 Ark. 91; *Riglander v. Star Co.*, 98 App. Div. 101, 103, 105, aff'd 181 N. Y. 531; *Bell v. Niewahner*, 54 App. Div. 530; *Barnes v. Barnes*, 53 N. C. 366, 374.

The Act can not be sustained on any doctrine related to an emergency.

*Mr. William Lemke*, Special Assistant Attorney General of North Dakota, and *Mr. Harry H. Peterson*, Attorney General of Minnesota, with whom *Mr. P. O. Sathre*, Attorney General of North Dakota, and *Messrs. David A. Sachs, Jr.*, and *Frank Rives* were on the brief, for respondent.

The power of Congress with respect to the "subject of bankruptcies" comprehends everything in the relations of an insolvent debtor and his creditors, extending to his and their relief. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181; *Sturges v. Crowninshield*, 4 Wheat. 122; *In re Klein*, reported in a note to *Nelson v. Carland*, 1 How. 265, 277; *Everett v. Stone*, 3 Story 446; *In re Reiman*, 7 Ben. 455; *In re Reiman*, 12 Blatch. 562.

Bankruptcy is a legal method of dealing with the problems of the depression. See President Hoover's Message, Feb. 29, 1932, Sen. Doc. 65, 72d Cong., 1st Sess; Report of the Judicial Conference, October 5, 1931. Congress enacted several separate acts each dealing with its special problems arising from this depression. Bankruptcy Act, §§ 74, 75, 75 (s), 76, 77, 77B, 80. Each is part of the Bankruptcy Law; and all are to be construed together as the complete expression of Congress upon the subject of bankruptcy.

By a shift in procedure from mere liquidation, which has proved ruinous because of depression conditions, to composition, extension, reorganization and rehabilitation, attempt is made to protect the creditor to the full value of the bankrupt's estate, to relieve debtors from the terri-



ble burden of debt, and to discharge the debtor in a condition, financial and otherwise, to take his place in his calling or business.

The use of the power to enact laws on the subject of bankruptcies to accomplish these purposes is sustained by the repeated decisions of this Court. *Neal v. Clark*, 95 U. S. 704; *United States v. Fox*, 95 U. S. 670; *Traer v. Clews*, 115 U. S. 528, 541; *Wetmore v. Markoe*, 196 U. S. 68, 77; *Burlingham v. Crouse*, 228 U. S. 459, 473; *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 554-555; *Maynard v. Elliott*, 283 U. S. 273, 277.

Many decisions of this Court emphasize the importance of discharge favorable to resumption of vocation or business. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 192; *Stellwagen v. Clum*, 254 U. S. 605, 617; *Local Loan Co. v. Hunt*, 292 U. S. 234, 244; *Hardie v. Swofford Bros. Dry Goods Co.*, 165 Fed. 588.

The economic conditions and emergency are a sufficient basis for the Act. *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 446.

In *Wilson v. New*, 243 U. S. 332, this Court held that the great national emergency growing out of a threatened national railway strike justified the enactment of the so-called Adamson Eight Hour Law. Congress may use its powers to legislate for the public welfare. *Reid v. Colorado*, 187 U. S. 137; *Lottery Case*, 188 U. S. 321; *Hipolite Egg Co. v. United States*, 220 U. S. 45; *Caminetti v. United States*, 242 U. S. 470; *Weber v. Freed*, 239 U. S. 325; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311; *Brooks v. United States*, 267 U. S. 432.

Congress may use both necessary and convenient means; and this is true even though they may partake of other governmental authority, such as the police power. Congress is the sole judge of the means to be used. *Hoke*

v. *United States*, 227 U. S. 308; *Seven Cases v. United States*, 239 U. S. 510.

Experience has demonstrated that 5 years is not uncommon for an equity receivership. Also that it takes substantially as long to administer an estate in bankruptcy as an equity receivership. Under the emergency conditions, Congress reasonably believed that bankruptcy cases would not be disposed of as quickly as in normal times.

That a power of such scope is not limited by the extent of its previous exercise, and is not exhausted by a partial exercise, would seem to be self-evident. *Taubel Co. v. Fox*, 264 U. S. 426.

That Congress had the power to pass the Frazier-Lemke Amendment to deal with the situation seems to be clear from the nature and the scope of the power itself. *In re Cope*, 8 F. Supp. 778; *In re Landquist*, 70 F. (2d) 929; *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 23; *Schumacher v. Beeler*, 293 U. S. 367.

There is really nothing new in the law in question, except perhaps the application of well settled principles of bankruptcy law in a novel way. It preserves liens; vests title to the bankrupt's property in the trustee; and provides for appraisal.

Section 7 provides for a reappraisal at the request of the lienholder. In such case "the debtor may then pay the appraised price, if acceptable to the lienholder, into the court, otherwise the original appraisal price shall be paid into court." It is clear that this gives the lienholder an option to accept or reject the reappraisal price. With this option he can take advantage of increase in value during the 5 year stay period and can not lose anything by decrease in value during the period. He is protected against loss in value and given the right to increases in value.

All bankruptcy laws provide for conversion of the bankrupt's estate into cash and a distribution of the cash among the creditors as it may appear they are entitled. No law provides that the property as such shall be distributed, or that a creditor has a right to receive the property as such. Even in cases in which he is permitted to enforce his lien in the state courts, the creditor receives the cash proceeds of the sale and not the property. It may be true that he sometimes bids in the property at the sale, but in such cases the bid is for cash and the property applied in payment. *Burlingham v. Crouse*, 228 U. S. 459; *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 554-555; *Maynard v. Elliott*, 283 U. S. 273, 277.

This law in effect transfers the petitioner's lien from the property to the proceeds of the property, and compels the creditor to pursue his remedy in the bankruptcy court instead of in the state court.

The power to transfer a lien from property to the cash proceeds of a sale is settled, in bankruptcy and in equity. *Van Huffel v. Harkelrode*, 284 U. S. 225. See Bankruptcy Form 44, 172 U. S. 709; *First Nat. Bank v. Shedd*, 121 U. S. 74, 87; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 367; *Taubel Co. v. Fox*, 264 U. S. 426, 430-431.

Paragraph 3 is a modified composition. It is purely voluntary on both sides.

Under § 13 of the Act of 1898 the composition is based upon voluntary assent so far as concerns the majority of creditors. It is involuntary in every sense so far as it concerns the minority. They do not have the right to refuse to assent even as the lienholder has under the Frazier-Lemke Amendment, and yet they are bound,—this by the will of other creditors. *Wilmot v. Mudge*, 103 U. S. 217; *Cumberland Glass Co. v. DeWitt*, 237 U. S. 447;

*Nassau Smelting Works v. Brightwood*, 265 U. S. 269.

In so far as this matter is concerned, the law in question uses an old device of bankruptcy law to bring debtor and creditor together to save the former's property for him. Under the Act of 1898, § 70 (f), title to the property reverts in the bankrupt upon the confirmation of the composition provided for in § 12. Under the Frazier-Lemke Act he becomes an owner by purchase, upon payment of the appraised value.

Paragraph 7 is an alternative in case the lienholder refuses his assent to a voluntary sale. First, it gives the bankrupt a right in the nature of an option to repurchase his property at any time within 5 years by payment into court of the appraisal price. Upon such payment by the bankrupt, "the court shall by order turn over full possession and title of said property to the debtor." Secondly, if the bankrupt fails to comply with the provisions of subsection 7, "the court may order the trustee to sell the property as provided in this title." It meets all the requirements of distribution and discharge. It makes certain the liquidation of the estate of the bankrupt so that distribution can be made. It provides for a sale in any event for that purpose. This is the limit of the rights of the creditor in bankruptcy. The time, manner and method of distribution are legislative and must be determined by Congress.

It is contended, however, that the bankrupt is not bound to buy during the time he holds possession, and that the matter of paying the appraisal price into court is purely optional with him. It is said that the Act confers rights and privileges on the bankrupt without imposing a corresponding liability on his part. The matter is purely legislative. In the exercise of admitted power, the legislature may confer such rights and privileges without imposing corresponding liabilities. *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398.

Such a stay may be regarded as in aid of making a sale to the bankrupt. Options are commonly used for the purpose of aiding and facilitating sales of property. The delay incident to the stay is no different in its effect from the delay incident to extending credit; yet the latter is a recognized power in bankruptcy administration. In any event, the property is sold. There is authority for holding that the stay in its practical effects is not unlike the credit extended in *Traer v. Clews*, 115 U. S. 528. *In re Cope*, 8 F. Supp. 778.

It is the underlying principle of bankruptcy that a debtor may be discharged from his liabilities, after his property has been appropriated by his creditors, without the assent of his creditors. The application of the principle to a lienholder under the provisions of the law here in question is no different from the application of it to minority and non-assenting creditors in cases of composition. *In re Reiman*, 7 Ben. 455; *Wilmot v. Mudge*, 103 U. S. 217, 220; *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U. S. 447; *Nassau Smelting Works v. Brightwood*, 265 U. S. 269; *In re Mirkus*, 289 Fed. 732.

The staying of proceedings in mortgage foreclosure is an appropriate remedy to protect the rights of the mortgagor under a constitutional statute. *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398.

It is permissible in bankruptcy to permit the bankrupt to remain in possession of the property. Sometimes this is done in connection with administration until it becomes necessary to assert the rights of the trustee. *In re Reiman*, *supra*; *Sparhawk v. Yerkes*, 142 U. S. 1, 14; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549; *Burlingham v. Crouse*, 228 U. S. 459.

There is a special reason why a farmer should be permitted to hold possession under the control of the court. The business which he has to transact is comparatively simple and it is an easy matter for the court to exercise

control and supervision over him. Then there is the fundamental reason: after a farmer is dispossessed he is practically impoverished and destroyed and the purposes of the law will be defeated in such cases.

The sale of the bankrupt's property to the bankrupt has been approved in many cases. *In re Reiman, supra*; *Traer v. Clews*, 115 U. S. 528; *Sparhawk v. Yerkes*, 142 U. S. 1, 14; *In re Cope*, 8 F. Supp. 778, 783; *In re Swoford Bros. Dry Goods Co.*, 180 Fed. 549. See *Prevost v. Gratz*, 6 Wheat. 481, 513; *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 361-362.

In the case of the voluntary proceedings under this law, the arrangement is one for an extension of credit. In the case of the proceedings under § 7, the farmer or bankrupt is given 5 years within which to raise the appraised price of the farm to pay into court to regain full possession and title. This is the equivalent of an extension of credit. This, too, has been commonly resorted to in bankruptcy cases. *In re Reiman, supra*; *In re Mirkus*, 289 Fed. 732; *Traer v. Clews*, 115 U. S. 528; *In re Swoford Bros. Dry Goods Co.*, 180 Fed. 510; 42 C. J. 202; *Lowndes v. Chisholm*, 2 McCord's Ch. 455; *Prudential Ins. Co. v. Lemmons*, 159 S. C. 121.

The provision for revesting full possession and title in the farmer bankrupt after he has made his payments in full under the Frazier-Lemke Amendment is not a new idea in bankruptcy law. It is used in connection with compositions under § 12 of the Act of 1898.

The Fifth Amendment does not take away any power granted to Congress by the Constitution, though it may in some respect limit the manner in which the power may be exercised. *McCray v. United States*, 195 U. S. 27; *Billings v. United States*, 232 U. S. 261; *Flint v. Stone Tracy Co.*, 220 U. S. 107; *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1. 24-25; *Magnano Co. v. Hamilton*, 292 U. S. 40. Under these cases, if the Court finds that the

Frazier-Lemke Amendment is a bankruptcy law, that settles also the question of whether or not it offends against the due process clause of the Fifth Amendment. Cf. *Child Labor Case*, 259 U. S. 20; *United States v. Doremus*, 249 U. S. 86; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181.

If the law does not constitute an exercise of granted power, it is unauthorized by the Constitution and hence invalid. If it does, the Fifth Amendment is inapplicable. *Fox v. Standard Oil Co.*, 294 U. S. 87. This, we think, is the true distinction upon which many cases invoking the Fifth Amendment may be distinguished. *Ochoa v. Hernandez*, 230 U. S. 139; *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 203; *Loan Assn. v. Topeka*, 20 Wall. 655.

The bankruptcy power includes by necessity the power to impair the obligation of contracts. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 188.

The petitioner has no rights in the bankrupt's property as such. In bankruptcy he has a right only to participate in the distribution of the bankrupt's estate after it has been converted into cash. Congress may legislate upon this matter and determine the manner and mode and time of the liquidation.

The bankruptcy proceedings terminate the rights of the parties as between themselves and place the whole matter in administration in bankruptcy. Petitioner claims that the denial of the right to foreclose its mortgage on the bankrupt's property in the state courts is a denial of due process. But enforcement of liens is a bankruptcy matter and Congress can confer jurisdiction on courts of bankruptcy to deal with it. *Van Huffel v. Harkelrode*, 284 U. S. 225; *Taubel Co. v. Fox*, 264 U. S. 426.

This disposes of petitioner's complaint of loss of interest during the option period and the insufficiency of the rental to pay taxes, insurance and repairs. There might

be some basis for petitioner's claim in ordinary proceedings, but not in bankruptcy. Furthermore, the rental fixed by the court is the compensatory equivalent for any alleged deprivation of the use of property, in the eyes of the law. *Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman*; *Levy Leasing Co. v. Siegel*, 258 U. S. 242; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398; *People v. La Fetra*, 230 N. Y. 429.

The creditor is given the full appraised value of the farm. Thereby nothing is taken from him. The proceedings in this respect constitute due process in ordinary proceedings at law and in equity.

*Mr. Edwin A. Krauthoff*, with whom *Messrs. Herbert C. Lust, David A. Sachs, Jr., and Frank Rives* were on the brief, for respondent.

The Tenth Amendment has no bearing on the proceeding under review.

A uniform law on the subject of bankruptcies is not limited to a sale of assets, distribution of the proceeds, and dispossession of the debtor. It may include reasonable provisions for a moratorium to the debtor and a repurchase by him of property appertaining to the estate. *In re Landquist*, 70 F. (2d) 729; *In re Chicago, R. I. & P. Ry. Co.*, 72 F. (2d) 443; *In re Jackson*, Fed. Cas. No. 7,124; *Kunzler v. Kohaus*, 5 Hill 317; *In re F. A. Hall Co.*, 121 Fed. 992; *Hurley v. Devlin*, 151 Fed. 919, 921; *Silverman's Case*, Fed. Cas. No. 12,855; *In re Reiman*, Fed. Cas. No. 11,673; *United States v. Pusey*, Fed. Cas. No. 16,098.

The right to repurchase given to a farmer in the Frazier-Lemke Act is an exemption granted by Congress in the exercise of its constitutional powers on that subject. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 186; *In re Smith*, Fed. Cas. No. 12,996; *Hurley v. Devlin*, 151 Fed. 919; *In re Reiman*, Fed. Cas. No. 11,675.



The United States is not limited in its enactment of bankruptcy laws to the English model prevailing in 1789.

Whether or not the moratorium or repurchase privileges of the Frazier-Lemke Act are so unreasonable or arbitrary as to violate the Fifth Amendment must necessarily depend upon the economic conditions existing at the time of their enforcement.

Federal courts are bound to take judicial notice of economic conditions. Judicial recognition of economic conditions that inspired this legislation are to be found in *Atchison, T. & S. F. Ry. Co. v. United States*, 284 U. S. 248; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398; *In re Radford*, 8 F. Supp. 489; *In re Cope*, 8 F. Supp. 778.

Section 75 (s) is a remedial law and as such is to be liberally construed to effect its purpose. *In re Chicago, R. I. & P. Ry. Co.*, 72 F. (2d) 443; *In re Landquist*, 70 F. (2d) 929; *Smith v. Smith*, 7 F. Supp. 490.

The Act merely affords to the farmer a "long chance" to reorganize himself. He is afforded no such opportunity as is any other class covered by the bankruptcy law. The purpose is to keep the farmer on his farm.

Interest on a secured claim stops with the filing of the petition in bankruptcy. *Sexton v. Dreyfus*, 219 U. S. 339. *In re Chandler*, 184 Fed. 887, 889; *In re Orne*, Fed. Cas. No. 10,581; *In re J. & S. Ferguson & Lyle*, 267 Fed. 817; *In re Vogler*, Fed. Cas. No. 16,986.

But under subdivision (7) a secured creditor will obtain interest. In this respect he is more fortunate than secured creditors under §§ 77 and 77B.

The "reasonable rental" referred to in § 75 (s) (7) requires an act of judicial determination, from all the facts submitted by all interested parties.

It is not unconstitutional to sell, or lease back, to the farmer, his own property.

The subsections relate to proceedings by consent and can raise no constitutional question. Generally speaking, the

lienholder can do what it wishes with its own property. But it is contended that if the lienholder does not consent to the sale, but objects, then it is mandatory upon the court to stay all proceedings for 5 years, and rent the property to the farmer for a "reasonable rental," with an option to purchase his own property at an appraised value, subsequently fixed by the court.

When it is considered that the lienholder has no constitutional right to bid in the property; that he has not even a statutory right at the present time to his lien, aside from the Frazier-Lemke Act, if the court desires to sell the property free of liens; that the lienholder has no constitutional right to interest after the filing of the petition; and that he has not even a statutory right to interest under the present law; it would seem that the constitutionality of the Act is clear, even if every other consideration were swept aside.

What rehabilitates the farmer rejuvenates the Nation.

Emergency calls forth the exercise of dormant power. An emergency is here. There is a distinct menace that ownership of farm lands will pass into the hands of a privileged few—that the owner-farmer will disappear and become a hired hand. If this happens, the Republic, as we know it, and as it was intended to endure, will be at an end.

Reasonable means are such as are adequate to meet the emergency while it is in existence, and which enable the Nation to exist as its founders intended it should.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case presents for decision the question whether sub-section (s) added to § 75 of the Bankruptcy Act<sup>1</sup> by

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<sup>1</sup>Section 75 had been added to the Bankruptcy Act on March 3, 1933, by c. 204, 47 Stat. 1470.

the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, is consistent with the Federal Constitution. The federal court for western Kentucky, 8 F. Supp. 489, and the Circuit Court of Appeals for the Sixth Circuit, 74 F. (2d) 576, held it valid in this case; and it has been sustained elsewhere.<sup>2</sup> In view of the novelty and importance of the question, we granted certiorari.

In 1922 (and in 1924) Radford mortgaged to the Louisville Joint Stock Land Bank a farm in Christian County, Kentucky, comprising 170 acres, then presumably of the appraised value of at least \$18,000.<sup>3</sup> The mortgages were given to secure loans aggregating \$9,000, to be repaid in instalments over the period of 34 years with interest at the rate of 6 per cent. Radford's wife joined in the mortgages and the notes. In 1931 and subsequent years, the Radfords made default in their covenant to pay the taxes. In 1932 and 1933, they made default in their promise to pay the instalments of interest and principal. In 1933,

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<sup>2</sup> *Bradford v. Fahey*, 76 F. (2d) 628; *In re Cope* (D. C. Colo.), 8 F. Supp. 778; *Galloway v. Union Trust Co.* (D. C. E. D. Arkansas), 9 F. Supp. 575; *In re Plumer* (D. C. S. D. Cal.), 9 F. Supp. 923; *In re Cyr* (D. C. N. D. Ind.), 9 F. Supp. 697; *In re Jones* (D. C. W. Mo.), 10 F. Supp. 165. Compare *In re Bradford*, 7 F. Supp. 365, rev. in *Bradford v. Fahey*, *supra*; *In re Moore*, 8 F. Supp. 393; *Paine v. Capital Freehold Land & Trust Co.*, 8 F. Supp. 500; *In re Miner*, 9 F. Supp. 1; *In re Duffy*, 9 F. Supp. 166; *In re Doty*, 10 F. Supp. 195; *In re Payne*, 10 F. Supp. 649 (holding the Act unconstitutional).

<sup>3</sup> The Bank was organized under the Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360. Section 12 of the Act provided that loans should not exceed 50 per cent. of the value of the land mortgaged and 20 per cent. of the value of permanent insured improvements thereon. The Bank loaned the Radfords \$8,000 in 1922 and an additional \$1,000 in 1924. The stocks and bonds of the Bank are privately owned. The bonds "being instrumentalities of the Government of the United States" are tax exempt. Compare *Smith v. Kansas City Title Co.*, 255 U. S. 180; *Federal Land Bank v. Crosland*, 261 U. S. 374; Act of May 12, 1933, c. 25, § 29, 48 Stat. 46.

they made default, also, in their covenant to keep the buildings insured. The Bank urged the Radfords to endeavor to refinance the indebtedness pursuant to the provisions of the Emergency Farm Mortgage Act, May 12, 1933, c. 25, 48 Stat. 41.<sup>4</sup> After they had declined to do so, the Bank, having declared the entire indebtedness immediately payable, commenced, in June, 1933, a suit in the Circuit Court for Christian County against the Radfords and their tenant to foreclose the mortgages; and, invoking a covenant in the mortgage expressly providing therefor, sought the appointment of a receiver to take possession and control of the premises and to collect the rents and profits.

The application for the appointment of a receiver was denied, and all proceedings in the suit were stayed, upon request of the Conciliation Commissioner for Christian County appointed under § 75 of the Bankruptcy Act, as he stated that Radford desired to avail himself of the provisions of that section. Proceeding under it, Radford filed, in the federal court for western Kentucky, a petition

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<sup>4</sup>That Act empowered the Federal Land Banks and the Land Bank Commissioner to lend farmers 75 per cent. of the normal value of their land, at 4½ per cent. interest for the first five years and 5 per cent. thereafter; no repayment of principal to be required for 5 years. Act of May 12, 1933, c. 25, §§ 24, 32, 48 Stat. 43, 48; Act of June 16, 1933, c. 98, § 80, 48 Stat. 273; Act of Jan. 31, 1934, c. 7, § 10, 48 Stat. 347. Mortgage loans made to farmers by the institutions subject to the Farm Credit Administration outstanding June 30, 1934, aggregated \$2,029,305,081. As of March 31, 1935, the loans had been increased to \$2,661,558,017. Farm Credit Administration, Monthly Reports on Loans and Discounts, March, 1935. "The proceeds of the loans closed [in 1933-34] both by the land banks and by the Land Bank Commissioner were used principally to refinance existing indebtedness. Of the loans closed by the land banks, approximately 86.8 per cent. were used for this purpose, and of those closed by the Commissioner, 92 per cent. were so used." The Farm Real Estate Situation, 1933-34. Circular No. 354 of United States Department of Agriculture, April, 1935, p. 5.

praying that he be afforded an opportunity to effect a composition of his debts. The petition was promptly approved and a meeting of the creditors was held. But Radford failed to obtain the acceptance of the requisite majority in number and amount to the composition proposed. Then, the Bank offered to accept a deed of the mortgaged property in full satisfaction of the indebtedness to it and to assume the unpaid taxes. Radford refused to execute the deed; and on June 30, 1934, the state court entered judgment ordering a foreclosure sale.

Meanwhile, the Frazier-Lemke Act had been passed on June 28, 1934; and on August 6, 1934, and again on November 10, 1934, Radford filed amended petitions for relief thereunder. The second amended petition prayed that Radford be adjudged a bankrupt; that his property, whether free or encumbered, be appraised; and that he have the relief provided for in Paragraphs 3 and 7 of subsection (s) of the Frazier-Lemke Amendment. That Act provides, among other things, that a farmer who has failed to obtain the consents requisite to a composition under §. 75 of the Bankruptcy Act, may, upon being adjudged a bankrupt, acquire alternative options in respect to mortgaged property:

1. By Paragraph 3, the bankrupt may, if the mortgagee assents, purchase the property at its then appraised value, acquiring title thereto as well as immediate possession, by agreeing to make deferred payments as follows: 2½ per cent. within two years; 2½ per cent. within three years; 5 per cent. within 4 years; 5 per cent. within 5 years; the balance within six years. All deferred payments to bear interest at the rate of 1 per cent. per annum.

2. By Paragraph 7, the bankrupt may, if the mortgagee refuses his assent to the immediate purchase on the above basis, require the bankruptcy court to  
“stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or

any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be made within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, under the provisions of this Act. At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property of which he retains possession: *Provided*, That upon request of any lien holder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lien holder, into the court, otherwise the original appraisal price shall be paid into court and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this Act: *Provided, however*, That the provisions of this Act shall apply only to debts existing at the time this Act becomes effective."

Answering the amended petition, the Bank duly claimed that the Frazier-Lemke Act is, and the relief sought would be, unconstitutional. It prayed that Radford's amended petition be dismissed; that the Bank be permitted to pursue its remedies in the state court; and that it be allowed to proceed with the foreclosure sale in accordance with the judgment of that court. It refused to accept the composition and extension proposal offered by Radford; declined to consent to the proposed sale of that property to Radford at the appraised value or any value on the terms set forth in Paragraph 3; and also objected to his retaining possession thereof with the privilege of purchasing the same provided by Paragraph 7. The federal court overruled the Bank's objections; denied its prayers; adjudged Radford a bankrupt within the meaning of the Frazier-Lemke Act; and appointed a referee to take proceedings

thereunder. There was no claim that the farm was exempt as a homestead or otherwise.

The referee ordered an appraisal of all of Radford's property, encumbered and unencumbered. The appraisers found that "the fair and reasonable value of the property of the debtor on which Louisville Joint Stock Bank has a mortgage" and also the "market value of said land" was then \$4,445.<sup>5</sup> The referee approved the appraisal, although the Bank offered in open court to pay \$9,205.09 in cash for the mortgaged property; and counsel for the bankrupt admitted that the Bank had a valid lien upon it for the amount so offered to be paid, and that, under the law, if the Bank's offer to purchase the property were accepted, all the money paid in in cash would be immediately returned to it in satisfaction of the mortgage indebtedness.

The Bank refused to consent to a sale of the mortgaged property to Radford at the appraised value and filed written objections to such sale and to the manner of payments prescribed by Paragraph 3 of sub-section (s). Thereupon, the referee ordered that, for the period of five years, all proceedings for the enforcement of the mortgages be stayed; and that the possession of the mortgaged property, subject to liens, remain in Radford, under the control of the court, as provided in Paragraph 7 of sub-section (s). The referee fixed the rental for the first year at \$325; and ordered that for each subsequent year the rental be fixed by the court. It was stipulated, that the

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<sup>5</sup>The appraisal dated December 1, 1934 recited originally that \$4,445 was the "fair and reasonable value," without mentioning the market value. It was, by leave of court, amended on December 4, 1934 to read as stated in the text. Besides the mortgaged property, Radford had a one-half interest in a half-acre lot and house thereon appraised at \$150; exempt personal property appraised at \$568; and non-exempt personal property at \$831.50. The amount of the indebtedness other than to the Bank, and the terms of the composition offered do not appear.

annual taxes and insurance premium amount to \$105; and admitted that administration charges said to amount to \$22.75 must be paid from the rental. All the orders of the referee were, upon a petition for a review, duly approved by the District Court; and its decree was affirmed by the Circuit Court of Appeals on February 11, 1935.

Since entry of the judgment of the Court of Appeals, this Court has held unconstitutional provisions of state legislation in some respects comparable to the Frazier-Lemke Act: *W. B. Worthen Co. v. Kavanaugh*, ante, p. 56. There we said: "With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor"; and, "So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." The Bank insists, among other things, that the Frazier-Lemke Act has been here applied with like result; that the provisions of the Act, even if applied solely to mortgages thereafter executed, would transcend the bankruptcy power; and that, in any event, to apply them to preëxisting mortgages violates the Fifth Amendment of the Federal Constitution. Radford contends that the Frazier-Lemke Act is valid because it is a proper exercise of the power conferred by Article I, § 8 of the Constitution, which declares: "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Before discussing these contentions, it will be helpful to consider the position occupied generally by mortgagees prior to the enactment here challenged.

*First.* For centuries efforts to protect necessitous mortgagors have been persistent. Gradually the mortgage of real estate was transformed from a conveyance upon condition into a lien; and failure of the mortgagor to pay on the day fixed ceased to effect an automatic foreclosure.



Courts of equity, applying their established jurisdiction to relieve against penalties and forfeitures, created the equity of redemption. Thus the mortgagor was given a reasonable time to cure the default and to require a reconveyance of the property. Legislation in many states carried this development further, and preserved the mortgagor's right to possession, even after default, until the conclusion of foreclosure proceedings.<sup>6</sup> But the statutory command that the mortgagor should not lose his property on default had always rested on the assumption that the mortgagee would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay. No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full.<sup>7</sup>

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<sup>6</sup>See Pomeroy's Equity Jurisprudence, §§ 162-3, 376, 381-2, 1180, 1186-1190, 1219; H. W. Chaplin, *The Story of Mortgage Law*, 4 Harv. Law Rev. 4; William F. Walsh, *Development of the Title and Lien Theories of Mortgages*, 9 New York University Law Quarterly Rev. 280.

<sup>7</sup>It is the general rule that a holder of the equity of redemption can redeem from the mortgagee only on paying the entire mortgage debt. *Collins v. Riggs*, 14 Wall. 491; *Jones v. Van Doren*, 130 U. S. 684, 692; *American Loan & Trust Co. v. Atlanta Electric Ry. Co.*, 99 Fed. 313, 315-6; *Lomas & Nettleton Co. v. Di Francesco*, 116 Conn. 253, 258; 164 Atl. 495; *Palk v. Lord Clinton*, 12 Ves. Jr. 48, 58. The rule is for the protection of the mortgagee, and unless waived by him, applies even when the redeemer has an interest in only part of the mortgaged property. *Bank of Luverne v. Turk*, 222 Ala. 549; 133 So. 52; *Quinn Plumbing Co. v. New Miami Shores Corp.*, 100 Fla. 413; 129 So. 690; *Shinn v. Barrie*, 182 Ark. 366; 31 S. W. (2d) 540. Recognized exceptions to the rule are based on the action of the mortgagee in himself causing the lien on a part of the mortgaged property to be extinguished, *Dexter v. Arnold*, Sumner 109, 118; *Welch v. Beers*, 8 Allen 151; *George v. Wood*, 11

This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage. His position in this respect was not changed when foreclosure by public sale superseded strict foreclosure or when the legislatures of many states created a right of redemption at the sale price. To protect his right to full payment on the mortgaged property, the mortgagee was allowed to bid at the judicial sale on foreclosure.<sup>8</sup> In many states other statutory changes were

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Allen 41; *Meachem v. Steele*, 93 Ill. 135; *Coffin v. Parker*, 127 N. Y. 117; 27 N. E. 814; or on the right of eminent domain, *Dows v. Congdon*, 16 How. Pr. 571; *Mutual Insurance Co. v. Easton & Amboy R. Co.*, 38 N. J. Eq. 132. Where the right of redemption after foreclosure sale is based entirely on statute, a different rule may be prescribed. Compare *Northwestern Mutual Life Ins. Co. v. Hansen*, 205 Iowa 789; 218 N. W. 502; *Tuttle v. Dewey*, 44 Iowa 306; *State v. Carpenter*, 19 Wash. 378; 53 Pac. 342; see *Dougherty v. Kubat*, 67 Neb. 269, 273; 93 N. W. 317. For collections of cases, see 2 Jones, Mortgages (8th ed. 1928) §§ 1370-1377; 2 Wiltsie, Mortgage Foreclosure (4th ed. 1927) §§ 1196-1213, 1071.

<sup>8</sup> Compare *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 361, 362; *Easton v. German-American Bank*, 127 U. S. 532; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 590; *Buchler v. Black*, 226 Fed. 703; *Caldwell v. Caldwell*, 173 Ala. 216; 55 So. 515; *Felton v. Le Breton*, 92 Cal. 457; 28 Pac. 490; *Chillicothe Paper Co. v. Wheeler*, 68 Ill. App. 343; *Kock v. Burgess*, 176 Iowa 493; 156 N. W. 174; 153 N. W. 534; *McNair v. Biddle*, 8 Mo. 257; *Stover v. Stark*, 61 Neb. 374; 85 N. W. 286; *Paulson v. Oregon Surety Co.*, 70 Ore. 175; 138 Pac. 838; *Blythe v. Richards*, 10 Serg. & R. 261; *Archambault v. Pierce*, 46 R. I. 295; 127 Atl. 146. Some states have abolished by statute the general rule that a mortgagee, exercising a power of sale conferred in the mortgage, may not purchase at his own sale. See *Heighe v. Sale of Real Estate*, 164 Md. 259; 164 Atl. 671, 676; *Ten Eyck v. Craig*, 62 N. Y. 406, 421; *Galvin v. Newton*, 19 R. I. 176, 178; 36 Atl. 3; 2 Wiltsie, Mortgage Foreclosure (4th ed. 1927), § 869.

In England, the power conferred upon the court in foreclosure proceedings, to order a sale, instead of strict foreclosure (15 & 16 Vict., c. 86, § 48; 44 & 45 Vict., c. 41, § 25) will not be exercised over the mortgagee's objection, when the property is not likely to

made in the form and detail of foreclosure and redemption.<sup>9</sup> But practically always the measures adopted for the mortgagor's relief, including moratorium legislation enacted by the several states during the present depression,<sup>10</sup> resulted primarily in a stay; and the relief afforded rested, as theretofore, upon the assumption that no substantive right of the mortgagee was being impaired, since payment in full of the debt with interest would fully compensate him.

Statutes for the relief of mortgagors, when applied to preëxisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W. B. Worthen Co. v. Kavanaugh*, ante, p. 56, when it appeared that this substantive right was substantially abridged. Compare *W. B. Worthen Co. v. Thomas*, 292 U. S. 426.

*Second.* Although each of our national bankruptcy acts followed a major or minor depression,<sup>11</sup> none had, prior

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bring the full amount of the mortgage debt, *Merchant Banking Co. v. London & Hanseatic Bank*, 55 L. J. Ch. 479; *Provident Clerks' Mutual Assn. v. Lewis*, 62 L. J. Ch. 89; at least, not unless security is put up to protect the objecting mortgagee; *Cripps v. Wood*, 51 L. J. Ch. 584; or a bidding reserved sufficient to cover the amount due the mortgagee, *Whitfield v. Roberts*, 5 Jur. N. S. 113. Compare *Corsellis v. Patman*, L. R. 4 Eq. 156; *Wooley v. Colman*, L. R. 21 Ch. Div. 169; *Hurst v. Hurst*, 16 Beav. 372.

<sup>9</sup> See 3 Jones, *Mortgages* (8th ed. 1928), c. 30.

<sup>10</sup> See A. H. Feller, *Moratory Legislation* (1933), 46 Harv. Law Rev. 1061, 1081; Commerce Clearing House, *Bank Law Federal Service*—"L." Unit—128 C. C. H., pp. 7802-7809.

<sup>11</sup> See John Hanna, *Agriculture and the Bankruptcy Act* (1934), 19 Minn. Law Review 1. The first Bankruptcy Act, April 4, 1800,

to the Frazier-Lemke amendment, sought to compel the holder of a mortgage to surrender to the bankrupt either the possession of the mortgaged property or the title, so long as any part of the debt thereby secured remained unpaid. The earlier bankruptcy acts created some exemptions of unencumbered property;<sup>12</sup> but none had attempted to enlarge the rights or privileges of the mortgagor as against the mortgagee. The provisions of the acts, so far as concerned the debtor, were aimed to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes," and to give him "a new opportunity in life and a clear field for future effort, unhampered by the pressure of discouragement and preëxisting debt." *Local Loan Co. v. Hunt*, 292 U. S. 234, 244. No bankruptcy act had undertaken to supply him capital with which to engage in business in the future. Some States had granted to debtors extensive exemptions of unencumbered property from liability to seizure in satisfaction of debts; and these exemptions were recognized by the bankruptcy act of 1867, as well as that of 1898. But unless the mortgagee released his security, in order to prove in bankruptcy for the full amount of the debt, a

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c. 19, 2 Stat. 19, followed the minor depression of 1798. The second Bankruptcy Act, August 19, 1841, c. 9, 5 Stat. 440, followed the severe depression of 1837. The third Bankruptcy Act, March 3, 1867, c. 176, 14 Stat. 517, followed the financial disturbances incident to the Civil War. The fourth Bankruptcy Act, July 1, 1898, c. 541, 30 Stat. 544, followed the depression of 1893. Farmers were first brought within the scope of our bankruptcy laws by the Act of 1841, which made voluntary bankruptcy available to all. In the Act of 1867, farmers were not, as in the Act of 1898, excluded from involuntary bankruptcy.

<sup>12</sup> Act of 1800, c. 19, §§ 34, 35, 2 Stat. 19, 30, 31; Act of 1841, c. 9, § 3, 5 Stat. 440, 443; Act of 1867, c. 176, § 14, 14 Stat. 517, 522.

mortgage even of exempt property was not disturbed by bankruptcy proceedings. *Long v. Bullard*, 117 U. S. 617.<sup>13</sup>

No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law. Supervening bankruptcy had, in the interest of other creditors, affected in some respects the remedies available to lien holders. In *Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, where, in a proceeding for reorganization of a railroad under § 77 of the Bankruptcy Act, the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this Court said: "The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. *Straton v. New*, 283 U. S. 318, 321, and cases cited." (p. 676.) "The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy." (p. 681.)

Bankruptcy acts had, either expressly, or by implication, as was held in *Van Huffel v. Harkelrode*, 284 U. S. 225, 227, authorized the court to direct, in the interest of other creditors, that all liens upon property forming a part of the bankrupt's estate be marshalled; that the property be sold free of encumbrances; and that the

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<sup>13</sup> Compare Hook, Does the Frazier-Lemke Amendment Grant Relief as to Debts Secured by Liens on Exempt Property (1934), 11 American Bankruptcy Review 21.

rights of all lienholders be transferred to the proceeds of the sale—a power which “had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure.” *First National Bank v. Shedd*, 121 U. S. 74, 87; *Mellon v. Moline Malleable Iron Works*, 131 U. S. 352, 367. Compare *Ray v. Norseworthy*, 23 Wall. 128, 135. But there had been no suggestion that such a sale could be made to the prejudice of the lienor, in the interest of either the debtor or of other creditors. By the settled practice, a sale free of liens will not be ordered by the bankruptcy court if it appears that the amount of the encumbrance exceeds the value of the property.<sup>14</sup> And the sale is always made so as to obtain for the property the highest possible price. No court appears ever to have authorized a sale at a price less than that which the lien creditor offered to pay for the property in cash.<sup>15</sup>

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<sup>14</sup> *Federal Land Bank v. Kurtz*, 70 F. (2d) 46; *New Liberty Loan & Savings Assn. v. Nusbaum*, 70 F. (2d) 49; *In re American Magne-stone Co.*, 34 F. (2d) 681; *In re Fayetteville Wagon-Wood & Lum-ber Co.*, 197 Fed. 180; *In re Foster*, 181 Fed. 703; *In re Gibbs*, 109 Fed. 627; *In re Cogley*, 107 Fed. 73; *In re Shaeffer*, 105 Fed. 352; *In re Styer*, 98 Fed. 290; *In re Taliafero*, Fed. Cas. No. 13,736 (Chief Justice Waite); see *Kimmel v. Crocker*, 72 F. (2d) 599, 601; *In re National Grain Corp.*, 9 F. (2d) 802, 803; *In re Franklin Brewing Co.*, 249 Fed. 333, 335; *In re Roger Brown & Co.*, 196 Fed. 758, 761; *In re Pittelkow*, 92 Fed. 901, 903; *Citizens Savings Bank v. Paducah*, 159 Ky. 583, 585; 167 S. W. 870; *Dugan v. Logan*, 229 Ky. 5, 12; 16 S. W. (2d) 763. Compare *In re Slotterbeck Chevrolet Co.*, 8 F. Supp. 1023; *In re Carl*, 5 F. Supp. 215; *In re Civic Center Realty Co.*, 26 F. (2d) 825. Where the mortgaged property is sold free of liens for less than the amount of the liens, the bankrupt estate and not the lienholders must bear the costs of the sale. *In re Harralson*, 179 Fed. 490; *In re Holmes Lumber Co.*, 189 Fed. 178, 181. Compare *Rubenstein v. Nourse*, 70 F. (2d) 482; *In re Dawkins*, 34 F. (2d) 581.

<sup>15</sup> In English bankruptcy proceedings, where mortgaged property is sold under order of the Commissioners, the mortgagee is permitted to bid, to prevent a sacrifice of the property, sometimes even

Thus, a sale free of liens in no way impairs any substantive right of the mortgagor; and such a sale is not analogous to the sale to the bankrupt provided for by Paragraph 7 of the Frazier-Lemke Act.

Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of Paragraph 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which “originates in a voluntary offer by the bankrupt, and results in the main, from voluntary acceptance by his creditors.” *Nassau Smelting & Refining Works v. Brightwood Bronze Foundry Co.*, 265 U. S. 269, 271; *Myers v. International Trust Co.*, 273 U. S. 380, 383. So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised by courts of law, *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9, 21; and of admiralty, *The Steamboat Orleans v. Phoebus*, 11 Pet. 175, 183. It is the same power, which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of reorganization approved by it as beneficial and assented to by the requisite majority of the creditors. *Shaw v. Railroad Co.*, 100 U. S. 605; *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U. S. 445. Compare *National Surety Co. v. Coriell*, 289 U. S. 426; *First National Bank v. Flershem*, 290 U. S. 504. In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composi-

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without previous leave of court. *Ex parte Ashley*, 3 Deac. & C. 510; *Ex parte Pedder*, 3 Deac. & C. 622; compare *Ex parte Davis*, 3 Deac. & C. 504; *Ex parte Bacon*, 2 Deac. & C. 181; *Ex parte Du Cane*, 1 Buck. 18; *Ex parte Marsh*, 1 Madd. 89.

tion is desired by the requisite majority and is approved by the court.<sup>16</sup> Never, so far as appears, has any composition affected a secured claim held by a single creditor. Compositions are comparable to the voluntary adjustment with the mortgagee provided for in Paragraph 3 of the Frazier-Lemke amendment. They are not analogous to the so-called adjustment compelled by Paragraph 7.

*Third.* The Bank contends that the Frazier-Lemke Act is void, because it is not a law "on the subject of Bankruptcies"; that it does not deal with that subject; and hence that it is in contravention of the Tenth Amendment, which declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument is that the essential features of a bankruptcy law are these: the surrender by the debtor of his property for ratable distribution among his creditors, except so far as encumbered or exempt, and the discharge by his creditors of all claims against the debtor; that, on the other hand, the main purpose, and the effect, of the Frazier-Lemke Act is to prevent distribution of the farmer-mortgagor's property; to enable him to remain in possession despite persisting default; to scale down the mortgage debt; and to give the mortgagor the option to acquire the full title to the property upon paying the reduced amount. Thus, it is urged, the Act effects a fundamental change in the relative rights of mortgagor and mortgagee

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<sup>16</sup> The principle of composition was first applied to the interests of secured creditors in their security, by § 74, added to the Bankruptcy Act by Act of March 3, 1933, c. 204, § 1, 47 Stat. 1467 (individual debtors); by § 75, Act of March 3, 1933, c. 204, § 1, 47 Stat. 1470 (agricultural compositions); by § 77, Act of March 3, 1933, c. 204, § 1, 47 Stat. 1474 (railroads engaged in interstate commerce); by § 77B, Act of June 7, 1934, c. 424, § 1, 48 Stat. 912 (corporations); and by § 80, Act of May 24, 1934, c. 345, 48 Stat. 798 (public debtors). The constitutionality of such provision in § 74 was considered in *In re Landquist*, 70 F. (2d) 929, 933.



of real property as determined by the law of the State in which the property is located. The Bank argues that if the bankruptcy clause were construed to permit the making of such fundamental changes Congress could deal with every phase of the relations between an insolvent or non-paying debtor and his creditors; that it might, among other things, divest state courts of jurisdiction over suits upon promissory notes between citizens of the same State; that commercial controversies arising from breach of contract might be brought under like control; that the obtaining of goods or credits by false pretences, for example, could be made a crime against the United States, despite the rule declared in *United States v. Fox*, 95 U. S. 670; that the commercial and financial life of each State would be in large measure subject to federal regulation; and that the lines between State and Federal Government could thus be redrawn by Congress.

It is true that the original purpose of our bankruptcy acts was the equal distribution of the debtor's property among his creditors; and that the aim of the legislation was to do this promptly.<sup>17</sup> But, the scope of the bankruptcy power conferred upon Congress is not necessarily limited to that which has been exercised. The first act provided only for compulsory proceedings against traders,

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<sup>17</sup> See *Bailey v. Glover*, 21 Wall. 342, 346; *Mayer v. Hellman*, 91 U. S. 496, 501; *Wiswall v. Campbell*, 93 U. S. 347, 350; *Hanover National Bank v. Moyses*, 186 U. S. 181, 186; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307; *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 554; *Straton v. New*, 283 U. S. 318, 320. Also *In re California Pacific R. Co.*, Fed. Cas. No. 2,315; *In re Jordan*, Fed. Cas. No. 7,514; *In re Reiman*, Fed. Cas. No. 11,673; *In re Vogler*, Fed. Cas. No. 16,986; *Leidigh Carriage Co. v. Stengel*, 95 Fed. 637, 647; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 556; Story on The Constitution (4th ed.) § 1106; Olmstead, Bankruptcy, A Commercial Regulation, 15 Harv. Law Rev. 829; Levinthal, The Early History of Bankruptcy Law, 66 U. of Pa. Law Rev. 223, 225.

bankers, brokers and underwriters. The operation of later ones has been gradually extended so as to include practically all insolvent debtors; to provide for voluntary petitions; and to permit compositions with creditors, even without an adjudication of bankruptcy. The discharge of the debtor has come to be an object of no less concern than the distribution of his property. *Hanover National Bank v. Moyses*, 186 U. S. 181. As was said in *Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648: "The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution."<sup>18</sup>

It is true that the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none; and that the

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<sup>18</sup>The oft-quoted definitions of the bankruptcy power indicate its broad scope. When in *In re Klein* (reported in a note to *Nelson v. Carland*, 1 How. 265, 277) the constitutionality of the Bankruptcy Act of 1841 was challenged because it brought within its scope insolvent debtors other than traders and provided for voluntary proceeding, Mr. Justice Catron, sitting in Circuit said: "I hold it [the bankruptcy power] extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress." Judge Blatchford when sustaining the provision for composition in *In re Reiman*, Fed. Cas. No. 11,673, p. 496, said that the subject of bankruptcy cannot properly be defined as "anything less than the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." And Mr. Justice Hunt, sitting in that case, on appeal to the Circuit Court said that "whatever relates to the subject of bankruptcy is within the jurisdiction of congress." Fed. Cas. No. 11,675, p. 501.

Frazier-Lemke Act is the first instance of an attempt, by a bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security. But we have no occasion to decide in this case whether the bankruptcy clause confers upon Congress generally the power to abridge the mortgagee's rights in specific property. Paragraph 7 declares that "the provisions of this Act shall apply only to debts existing at the time this Act becomes effective." The power over property pledged as security after the date of the Act may be greater than over property pledged before; and this Act deals only with preëxisting mortgages. Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.

*Fourth.* The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.<sup>19</sup> Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. Compare *Mitchell v. Clark*, 110 U. S. 633, 643. But the effect of the Act here complained of is not the discharge of Radford's personal obligation.

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<sup>19</sup> For instance, the war power, *Ex parte Milligan*, 4 Wall. 2, 119; *Ochoa v. Hernandez*, 230 U. S. 139, 153-4; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155. The power to tax, *United States v. Railroad Co.*, 17 Wall. 322; *Boyd v. United States*, 116 U. S. 616; *Nichols v. Coolidge*, 274 U. S. 531, 542; *Blodgett v. Holden*, 275 U. S. 142, 147; *Barclay & Co. v. Edwards*, 267 U. S. 442, 450; *Heiner v. Donnan*, 285 U. S. 312, 326. The power to regulate commerce, *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 336; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 571; *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 410; *United States v. Lynah*, 188 U. S. 445, 471; *United States v. Cress*, 243 U. S. 316, 326. The power to exclude aliens, *Wong Wing v. United States*, 163 U. S. 228, 236, 237-8. Compare *Perry v. United States*, 294 U. S. 330.

It is the taking of substantive rights in specific property acquired by the Bank prior to the Act. In order to determine whether rights of that nature have been taken, we must ascertain what the mortgagee's rights were before the passage of the Act. We turn, therefore, first to the law of the State.

Under the law of Kentucky, a mortgage creates a lien which may be foreclosed only by suit resulting in a judicial sale of the property. Civil Code of Practice, §§ 375, 376; *Insurance Co. of North America v. Cheatham*, 221 Ky. 668, 672; 299 S. W. 545. While mere default does not entitle the mortgagee to possession, *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush 673, 705, § 299 of the Code provides that, in an action for the sale of mortgaged property a receiver may be appointed if it appears "that the property is probably insufficient to discharge the mortgage debt," *Mortgage Union v. King*, 245 Ky. 691; 54 S. W. (2d) 49; and where there is (as here) a pledge in the mortgage of rents, issues and profits, and provision for appointment of a receiver, the mortgagee is entitled as of right to have a receiver appointed to collect them for his benefit, *Brasfield & Son v. Northwestern Mutual Life Ins. Co.*, 233 Ky. 94; 25 S. W. (2d) 72; *Watt's Administrator v. Smith*, 250 Ky. 617, 630; 63 S. W. (2d) 796. Under § 374 of the Code a sale may be ordered at any time after default. Under Carroll's Stat. (1930), §§ 2362, 2364, there must be an appraisal before the sale; and if the sale brings less than two-thirds of the appraised value the mortgagor may redeem within a year by paying the original purchase money and interest at 10 per cent. But inadequacy of price is not alone ground for setting aside a sale. *Kentucky Joint Land Bank v. Fitzpatrick*, 237 Ky. 624; 36 S. W. (2d) 25. No provision permits the mortgagor to obtain a release or surrender of the property before foreclosure without paying in full the indebtedness secured. Nor does any provision prohibit a mortgagee

from protecting his interest in the property by bidding at the foreclosure sale. Thus, the controlling purpose of the law of Kentucky was and is that mortgaged property shall be devoted primarily to the satisfaction of the debt secured; and the provisions of its law are appropriate to ensure that result.

For the rights acquired and possessed by the mortgagee under the law of Kentucky, the Act substituted only the following alternatives:

(A) Under Paragraph 3, the mortgagee may, if the bankrupt so requests, assent to a so-called sale by the trustee to the bankrupt at a so-called appraised value; and upon such assent an implied promise arises to purchase the property on the terms prescribed in that Paragraph. But, the transaction would not confer upon the mortgagee the ordinary fruits of an immediate sale; nor would the agreement of sale, if performed by the bankrupt, result in payment at the appraised value. The mortgagee would not get the ordinary fruits of an immediate sale on deferred payments; for the bankrupt would make no down payment at the time of taking possession and would give no other assurance that the payments promised would in fact be made. And, if all such payments were duly made, the sale would not be at the appraised value; for the value of money (even if there were no risk) is obviously more than one per cent.<sup>20</sup> By restricting, throughout the period of six years, the annual interest on the deferred payments to one per cent., a sale at much less than the appraised value is prescribed. The aggregate payments of principal and interest prescribed would in no year before the end of the sixth be as much

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<sup>20</sup> In no state of the Union, in 1921, was the maximum lawful rate of interest less than 6 per cent. per annum; and in only two states was the legal rate as low as 5 per cent. Ryan, *Usury and Usury Laws* (1924), pp. 28-31. In Kentucky, 6 per cent. is both the legal and the lawful rate. Carroll's Ky. Stat. (1933), §§ 2218, 2219.

as six per cent. on the appraised value.<sup>21</sup> Moreover, before any deferred payment of the purchase price is made, there is serious danger that the Bank's investment might be further impaired. The mortgaged property might be lessened in value by waste. It might become burdened with the liens for accruing unpaid taxes;<sup>22</sup> for, while interest at the rate of 1 per cent. of the appraised value of the Radford farm is \$44.45, the present annual taxes (plus insurance premium) are, as stipulated, \$105. Thus if the alternative offered by Paragraph 3 were accepted, the transaction would result merely in a transfer of possession to the bankrupt for six years with an otherwise unsecured promise to purchase at the end of the period for a price less than the appraised value.

(B) If the mortgagee refuses to consent to the agreement to sell under Paragraph 3, he is compelled, by Paragraph 7, to surrender to the bankrupt possession of the property for the period of five years; and during those

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<sup>21</sup> The prescribed payment (interest) for the first year is 1 per cent. on the appraised value. The prescribed payment for the second year is 3½ per cent. thereof (1 per cent. for interest, 2½ per cent. on account of principal). The prescribed payment for the third year is 2½ per cent. of the principal and as interest 1 per cent. on 97½ per cent. of the principal. The prescribed payment for the fourth year is 5 per cent. on account of the principal and as interest, 1 per cent. on 95 per cent. of the principal. The prescribed payment for the fifth year is 5 per cent. on account of principal, and as interest, 1 per cent. on 90 per cent. of the principal. The prescribed payment at the end of the sixth year is 85 per cent. of the principal, and as interest 1 per cent. of 85 per cent. of the principal. The present value calculated on a 6 per cent. basis, of all deferred payments (principal and interest) would be only 76.6 per cent. of the appraised value. In other words, the agreement to sell if assented to by the mortgagee would require him to relinquish his security not for its appraised value in cash, but for deferred payments which, if met, would yield (on a 6 per cent. basis) only 76.6 per cent. of the appraised value.

<sup>22</sup> When the decree complained of was issued there had already been defaults in tax payments continuing more than two years. See page 1.

years, the bankrupt's only monetary obligation is to pay a reasonable rental fixed by the court. There is no provision for the payment of insurance or taxes, save as these may be paid from the rental received. During that period the bankrupt has an option to purchase the farm at any time at its appraised, or reappraised, value.<sup>23</sup> The mortgagee is not only compelled to submit to the sale to the bankrupt, but to a sale made at such time as the latter may choose. Thus, the bankrupt may leave it uncertain for years whether he will purchase; and in the end he may decline to buy. Meanwhile the mortgagee may have had (and been obliged to decline) an offer from some other person to take the farm at a price sufficient to satisfy the full amount then due by the debtor. The mortgagee cannot require a reappraisal when, in its judgment, the time comes to sell; it may ask for a reappraisal only if and when the bankrupt requests a sale. Thus the mortgagee is afforded no protection if the request is made when values are depressed to a point lower than the original appraisal. While Paragraph 7 declares that the bankrupt's possession is "under the control of the court," this clause gives merely supervisory power. Such control leaves the court powerless to terminate the option unless there has been the commission of waste or failure to pay the prescribed rent.

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<sup>23</sup> This is the construction given to Paragraph 7 by both of the lower courts, by both of the parties in their briefs and oral arguments here, and, so far as appears, by all other courts and judges that have passed upon the Act, except District Judge Lindley, who, in *In re Miner*, 9 F. Supp. 1, held that Paragraph 7, as well as Paragraph 3, was conditioned upon the mortgagee's consent to a sale to the debtor at the appraised value. See also John Hanna, *Agriculture and the Bankruptcy Act*, 19 Minn. L. Rev. 1, 19, 20; Report of Judiciary Committee, No. 370, p. 2, 74th Congress, 1st Session, April 1, 1935, on H. R. 5452. We refrain from discussing this question of construction as well as some others raised which are deemed unfounded.

*Fifth.* The controlling purpose of the Act is to preserve to the mortgagor the ownership and enjoyment of the farm property. It does not seek primarily a discharge of all personal obligations—a function with which alone bankruptcy acts have heretofore dealt. Nor does it make provision of that nature by prohibiting, limiting or postponing deficiency judgments, as do some State laws.<sup>24</sup> Its avowed object is to take from the mortgagee rights in the specific property held as security; and to that end “to scale down the indebtedness” to the present value of the property.<sup>25</sup> As here applied it has taken from the Bank the following property rights recognized by the Law of Kentucky:

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by a judicial public sale.

3. The right to determine when such sale shall be held, subject only to the discretion of the court.

4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the pro-

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<sup>24</sup> This has been done by recent state legislation. Compare Arizona, 1933, c. 88; Arkansas, 1933, Act No. 57; see *Adams v. Spillyards*, 187 Ark. 641; 61 S. W. (2d) 686; California, 1933, c. 793; Idaho, 1933, c. 150; Kansas, 1935, H. B. 299; Louisiana, 1934, Act No. 28; Minnesota, 1933, c. 339; Montana, 1935, H. B. 16; Nebraska, 1933, c. 41; New Jersey, 1933, c. 22; see *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596; 169 Atl. 177; New York, 1933, c. 794; 1934, c. 277; 1935, c. 2; North Carolina, 1933, c. 36; North Dakota, 1933, c. 155; South Carolina, 1933, Act No. 264; South Dakota, 1933, c. 138, 1935, H. B. 109; Texas, 1933, c. 92; see *Langever v. Miller*, 124 Tex. 80; 76 S. W. (2d) 1025.

<sup>25</sup> See Senate Report No. 1215 on S. 3580, May 28, 1934, p. 3; House Report No. 1898 on H. R. 9865, June 4, 1934, p. 4, incorporating as a part thereof a memorandum of Representative Lemke.



ceeds of a fair competitive sale or by taking the property itself.

5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

Strong evidence that the taking of these rights from the mortgagee effects a substantial impairment of the security is furnished by the occurrences in the Senate which led to the adoption there of the amendment to the bill declaring that the Act "shall apply only to debts existing at the time this Act becomes effective." The bill as passed by the House applied to both preëxisting and future mortgages. It was amended in the Senate so as to limit it to existing mortgages; and as so amended was adopted by both Houses pursuant to the report of the Conference Committee.<sup>26</sup> This was done because, in the Senate, it was pointed out that the bill, if made applicable to future mortgages, would destroy the farmer's future mortgage credit.<sup>27</sup>

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<sup>26</sup> See Conference Report, June 18, 1934, 73d Cong., 2d Sess., 78 Cong. Rec., pp. 12,376, 12,491.

<sup>27</sup> Senator Bankhead said: "If it applied only to existing mortgages, I should be glad to support it; but here is a program presented, not limited to existing mortgages, but a permanent program for the composition of mortgages. When a farmer goes to his advancing merchant, or goes to his banker, or applies to an insurance company for a loan under this bill, I want to know, and I am enquiring with earnest anxiety about it, what effect is it going to have upon those credit facilities for the farmers of this country." *Id.*, p. 12,074.

Senator Fess: "It does seem to me that we might destroy the credit which he insists the farmers have, because everyone realizes that by the passage of this bill we may be making it impossible for the farmer in the future to borrow money." *Id.*, p. 12,075.

Representative Peyser expressed the same view: "I believe that many of the Members are overlooking a very vital point in connection with this legislation—that is the fact that you are removing from

*Sixth.* Radford contends that these changes in the position of the Bank wrought pursuant to the Act, do not impair substantive rights, because the Bank retains every right in the property to which it is entitled. The contention rests upon the unfounded assertion that its only substantive right under the mortgage is to have the value of the security applied to the satisfaction of the debt. It would be more accurate to say that the only right under the mortgage left to the Bank is the right to retain its lien until the mortgagor, sometime within the five-year period, chooses to release it by paying the appraised value of the property. A mortgage lien so limited in character and incident is of course legally conceivable. It might be created by contract under existing law.<sup>28</sup> If a part of the mortgaged property were taken by eminent domain a mortgagee would receive payment on a similar basis.<sup>29</sup> But the Frazier-Lemke Act does not purport to exercise the right of eminent domain; and neither the law of Kentucky nor Radford's mortgages contain any provision conferring upon the mortgagor an option to compel, at any time within five years, a release of the farm upon payment of its appraised value and a right to retain meanwhile possession, upon paying a rental to be fixed by the bankruptcy courts.

Equally unfounded is the contention that the mortgagee is not injured by the denial of possession for the five years,

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the farmer the possibility of securing any mortgage assistance in the future. I believe in the enactment of this law and the scaling down of values you are going to take away the possibility of help that may be needed by these farmers in the future." *Id.*, p. 12,137.

<sup>28</sup> Many instances can be found of mortgages which provide that parcels of the mortgaged property shall be released upon payment of fixed amounts or upon payment of their value upon an appraisal therein provided for. See 1 Jones, *Mortgages* (8th ed. 1928), § 98. Compare *Clarke v. Cowan*, 206 Mass. 252.

<sup>29</sup> See 2 Jones, *Mortgages* (8th ed. 1928), § 843.

since it receives the rental value of the property.<sup>30</sup> It is argued that experience has proved that five years is not unreasonably long, since a longer period is commonly required to complete a voluntary contract for the sale and purchase of a farm; or to close a bankruptcy estate; or to close a railroad receivership. And it is asserted that Radford is, in effect, acting as receiver for the bankruptcy court. Radford's argument ignores the fact that in ordinary bankruptcy proceedings and in equity receiverships, the court may in its discretion, order an immediate sale and closing of the estate; and it ignores, also, the fundamental difference in purpose between the delay permitted in those proceedings and that prescribed by Congress. When a court of equity allows a receivership to continue, it does so to prevent a sacrifice of the creditor's interest. Under the Act, the purpose of the delay in making a sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee.

*Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, upon which Radford relies, lends no support to his contention. There the statute left the period of the extension of the right of redemption to be determined by the court within the maximum limit of two years. Even after the

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<sup>30</sup> Counsel for the debtor suggests that the reasonable rental provided for in Paragraph 7, is more than the secured creditor ordinarily receives in bankruptcy, since interest on secured as well as unsecured claims ceases with the filing of the petition. But the rule relied upon applies only when the secured creditor, having realized upon his security, is seeking as a general creditor to prove for the deficiency against the bankrupt estate. *Sexton v. Dreyfus*, 219 U. S. 339. It has no application when the mortgagee has a preferred claim against proceeds realized by the trustee from a sale of the security free of liens. *Coder v. Arts*, 213 U. S. 223, 228, 245, affirming 152 Fed. 943, 950; *People's Homestead Assn. v. Bartlette*, 33 F. (2d) 561; *Mortgage Loan Co. v. Livingston*, 45 F. (2d) 28, 34.

period had been decided upon, it could, as was pointed out, "be reduced by order of the court under the statute, in case of a change in circumstances, . . . ." (p. 447); and at the close of the period, the mortgagee was free to apply the mortgaged property to the satisfaction of the mortgage debt. Here, the option and the possession would continue although the emergency which is relied upon as justifying the Act ended before November 30, 1939.<sup>31</sup>

*Seventh.* Radford contends further that the changes in the mortgagee's rights in the property, even if substantial, are not arbitrary and unreasonable, because they were made for a permissible public purpose. That claim appears to rest primarily upon the following propositions:

(1) The welfare of the Nation demands that our farms be individually owned by those who operate them. (2) To permit widespread foreclosure of farm mortgages would result in transferring ownership, in large measure, to great corporations; would transform farmer-owners into tenants or farm laborers; and would tend to create a peasant class. (3) There was grave danger at the time of the passage of the Act, that foreclosure of farms would become widespread. The persistent decline in the prices of agricultural products, as compared with the prices of articles which farmers are obliged to purchase, had been accentuated by the long continued depression and had made it impossible

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<sup>31</sup> As by § 75 the petition of the farmer-mortgagor may be filed at any time within five years after March 3, 1933, and the period of the possession and of the option extends for five years, the provision might bar enforcement of an existing mortgage until 1943.

Counsel for Radford contends that the five year provision of Paragraph 7 is not inflexible, because, under the rule of *Chastleton Corporation v. Sinclair*, 264 U. S. 543, it would cease to be effective on the termination of the emergency which is relied upon to justify the Act. But the Act does not make the five year option period dependent upon the continuance of a national emergency; and the options conferred upon the farmer-owner show that it was the needs of the particular debtor to which consideration was given.

for farmers to pay the charges accruing under existing mortgages. (4) Thus had arisen an emergency requiring congressional action. To avert the threatened calamity the Act presented an appropriate remedy. Extensive economic data, of which in large part we may take judicial notice, were submitted in support of these propositions.

The Bank calls attention, among other things, to the fact that the Act is not limited to mortgages of farms operated by the owners; that the finding of the lower courts that Radford is a farmer within the meaning of the Act does not necessarily imply that he operates his farm; and that at least part of it must have been rented to another, since a tenant is joined as defendant in the foreclosure suit. Section 75 of the Bankruptcy Act (to which this Act is an amendment), provides in sub-section (r) that "the term 'farmer' means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations." Thus, the Act affords relief not only to those owners who operate their farms, but also to all individual landlords the "principal part of whose income is derived" from the "farming operations" of share croppers or other tenants; and, among these landlords, to persons who are merely capitalist absentees.<sup>32</sup>

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<sup>32</sup> In 1930, only 56 per cent. of the farm mortgage debt of the country rested on farms operated by their owners. The Farm Debt Problem, Letter from the Secretary of Agriculture, House Doc. No. 9, p. 9, 73d Cong., 1st Sess. Of the landlords of farms throughout the United States: "More than a third are engaged in agricultural occupations, nearly another third are retired farmers, and the remaining third are in non-agricultural occupations, mostly country bankers, merchants and professional men in the country towns and villages who have either come into farm ownership through inheritance or marriage, or have purchased farms for purposes of investment or speculation." Yearbook of Agriculture (1923), p. 538. "Furthermore, the percentage of cases in which landlords were remote from their farms is higher in some of the more recently developed farming regions than

It has been suggested that the number of farms operated by tenants was very large before the present depression;<sup>33</sup> that the increase of tenancy had been progressive for more than half a century;<sup>34</sup> that the increase has not been attributable, in the main, to foreclosures;<sup>35</sup> and that,

in some of the older farming regions. Thus in eastern North Dakota 40 per cent. of the tenant farms were owned by landlords not residing in the same county and the proportion is nearly as large in central Kansas and in Oklahoma." *Id.*, p. 535.

<sup>33</sup> Of the 6,288,648 farms in 1930, 42.4 per cent. were operated by tenants. The percentage in Kentucky operated by tenants was 35.9 per cent.; in Iowa, 47.3 per cent.; in Georgia, 68.2 per cent. In the South, 1,790,783 families were working as tenant farmers. See Hearings, March 5, 1935, on S. 2367, the Bill to create the Farm Tenant Homes Corporation, pp. 6, 14, 15, 16, 18, 39, 70, 72, 75, and Sen. Rep. 446, 74th Cong., 1st Sess., April 11, 1935.

<sup>34</sup> During the half century prior to the present business depression, every decennial census recorded a progressive increase in farm tenancy. Of the 4,008,907 farms in the United States in 1880, 25.6 per cent. were operated by tenants; of the 6,448,343 farms in 1920, 38.1 per cent. were operated by tenants. Farm Tenure, Census of 1920, Agriculture, Vol. V, p. 133, T. 11. The percentage of improved farm land operated by owners in 1920 was only 46.8. Farm Ownership & Tenancy, Yearbook of Agriculture (1923), p. 509.

<sup>35</sup> "Causes underlying this upward trend of tenancy are complex and obscure. The trend has apparently continued through the various shades of adversity and prosperity. Farms operated by managers are not classed with tenancy. As has been pointed out before, the best, most productive lands have the greatest tenancy. Apparently tenancy does not thrive on poor lands. It is hardly thinkable that high productiveness is a result of tenancy. It is a fact, however, that the largest up-trend in the yield of corn per acre is in the area of greatest tenancy." Iowa Year Book of Agriculture (1931), p. 349. In Iowa, 1927, tenant operated acres were 53.9 per cent. of the total acres in farms. In 1930 the percentage was 54.8; in 1931, it was 55.4. In 1932 it was 57.7; in 1933, 58.6. *Id.* (1932) p. 168; (1933) p. 213. See also Yearbook of Agriculture (1923), pp. 539-547; Turner, Ownership of Tenant Farms in the United States. Bull. No. 1432, and Ownership of Tenant Farms in North Central States, Bull. No. 1433, U. S. Dep't of Agriculture (1926).

in some regions, the increase in tenancy has been marked during the period when farm incomes were large and farm values, farm taxes and farm mortgages were rising rapidly.<sup>36</sup>

We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the Act. Nor need we consider the occupations of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, shows that the gravity of the situation has been appreciated.<sup>37</sup> The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare *Ochoa v. Hernandez*, 230 U. S. 139, 161; *Loan Association v. Topeka*, 20 Wall. 655, 662, 664; *In re Dillard*, Fed. Cas. No. 3,912, p. 706. As we conclude that the Act as applied has done so, we must

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<sup>36</sup> "The increase in tenancy in the West North Central States is without doubt the result of the price situation. Land bought in the period of high prices could not be paid for, with the result that it is now operated by tenants." Yearbook of Agriculture, 1932, p. 494. From 1910 to 1920, farm mortgage debt increased from \$3,320,470,000 to \$7,857,700,000. See The Farm Debt Problem, House Doc. No. 9, p. 5, 73d Cong., 1st Sess. In 1910 the total acreage of farm land was 878,798,325; in 1920, it was 955,883,715. Census of 1920, Agriculture, Vol. V, p. 32, T. 3. The greatly increased local tax rate, in connection with increased land values, has been suggested as being an important cause of increasing farm tenancy. Hearings on S. 2367, p. 16. The average value of farm property per acre in 1880, was \$22.72; in 1920, \$81.52; in 1930, \$58.01. Census of 1930, Agriculture, Vol. II, p. 10, T. I. Farm property taxes in 1910 amounted to approximately \$268 millions; in 1920, to \$452 millions; in 1932, to \$629 millions. See The Farm Debt Problem, *supra*, p. 21.

<sup>37</sup> See Note 4.

hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

*Reversed.*

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### HUMPHREY'S EXECUTOR *v.* UNITED STATES.\*

#### CERTIFICATE FROM THE COURT OF CLAIMS.

No. 667. Argued May 1, 1935.—Decided May 27, 1935.

1. The Federal Trade Commission Act fixes the terms of the Commissioners and provides that any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. *Held* that Congress intended to restrict the power of removal to one or more of those causes. *Shurtleff v. United States*, 189 U. S. 311, distinguished. Pp. 621, 626.
2. This construction of the Act is confirmed by a consideration of the character of the Commission—an independent, non-partisan body of experts, charged with duties neither political nor executive, but predominantly quasi-judicial and quasi-legislative; and by the legislative history of the Act. P. 624.
3. When Congress provides for the appointment of officers whose functions, like those of the Federal Trade Commissioners, are of legislative and judicial quality, rather than executive, and limits the grounds upon which they may be removed from office, the President has no constitutional power to remove them for reasons other than those so specified. *Myers v. United States*, 272 U. S. 52, limited, and expressions in that opinion in part disapproved. Pp. 626, 627.

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\* The docket title of this case is: *Rathbun, Executor, v. United States*.